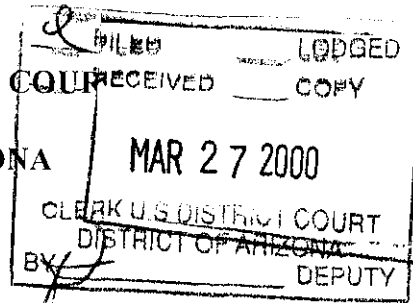


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA



MARK A. KOCH,

Plaintiff,

vs.

SAMUEL LEWIS, et al.,

Defendants.

No. CIV. 90-1872 PHX-JBM

MEMORANDUM AND ORDER

Plaintiff Mark Koch, an inmate in the Arizona Department of Corrections (ADOC), filed his original complaint in this action on December 7, 1990, alleging that ADOC officers violated his civil rights when they subjected him to unlawful searches, placed him in unwarranted administrative segregation, and generally retaliated against him for the exercise of his civil rights. Ten years later we have reviewed the lengthy and convoluted record, along with the parties' most recent status reports and their cross motions for summary judgment on the supplemental complaint, and conclude that a number of issues remain for trial. We will soon resolve the pending dispositive motions. In the meantime, we address some important housekeeping matters.

A. Discovery

Koch maintains that two discovery motions are still pending: Koch's motion (document number (doc#) 140), on September 22, 1998, to clarify Magistrate Judge Mathis' June 3, 1998 order (doc#122) regarding Koch's earlier motion to compel (doc#118); and Koch's motion (doc#146), on October 27, 1998, for an order to show cause why defendants should not be held in contempt for failing to comply with Judge Mathis' orders to produce

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certain documents. We believe doc#140 was resolved by our order, dated August 31, 1999 (entered twice as doc#175 and doc#176). In that decision we found that the central issue in the motion concerned the disclosure of the STG records, an issue which we dealt with in our earlier order dated September 1, 1998 (doc#139).

In plaintiff's motion for an order to show cause, however, Koch points out that Judge Mathis ordered the production of a number of documents that did not contain confidential STG information. After reviewing the judge's orders and defendants' responses, we find that there may be some outstanding discovery on issues which remain in play.

Judge Mathis granted the following discovery requests:

Request 1: All internal memorandum, classification decision or other document establishing the existence of the individuals(s) responsible for ordering, and causing to be ordered, Plaintiff's transfer from the Level-3 Mohave Unit to the Level-4 Kaibab Unit on 2/22/95.

Defendants respond that this request concerns the STG validation, but there is no indication in the record that this custody transfer was related to a threat group validation. In his affidavit, submitted with his motion for a preliminary injunction, Koch states that he was informed that the transfer was due to a "population adjustment" (doc#90, Koch aff. at 3 ¶ 19). It is uncontested that Koch did not receive a notice of hearing regarding threat group activity until March 8, 1995. It would appear that documentation regarding this atypical transfer from a level-1 status to a level-4 has not been forthcoming.

Request 3: All documents establishing the existence of what facts or circumstances motivated defendant Herman's Notice of STG Validation issued to plaintiff on 3/7/95. (redaction for security allowed)

We dealt with this request in our September 1988 order.

Request 4: All sign-in logs and other relevant documents regarding plaintiff's

access to the law library between March 1995 and August 1995.

The state says it has produced all relevant documents. Koch says they only produced his personal library requests and not the sign in logs.

Request 5: All documents establishing the existence of what facts or circumstances prompted defendant Herman to issue a second Notice of STG Validation on 1/9/96.

We dealt with this request in our September 1988 order.

Request 6: All documents and information establishing the existence of why plaintiff was not transferred to the East Unit as approved by central classification on May 4, 1995 and September 29, 1995.

The state says Koch was not transferred due to bed space shortage and there is no documentation available.

Request 12: All affidavits, documents or ADOC memorandum establishing the existence of defendant Herman's submission of a false affidavit in Feinberg v. ADOC, No. Civ. 88-0725 PHX CAM (MS), re supp. response to court order, dated January 27, 1989.

The state says Koch already has a copy of the pleading (he attached it as Ex. B to doc#140) and any other records were destroyed pursuant to the state's record retention policy on November 5, 1996. The notorious pleading, filed by the Attorney General, informed the Feinberg court that it had become aware of information indicating that Warden George Herman knowingly caused money to be placed into an inmate's account "for the sole purpose of causing the inmate to be denied indigency status" and court appointed counsel. The pleading also indicates that Samuel Lewis, the Director of the Department of Corrections, was aware of the incident and intended to initiate an investigation. With his motion for clarification, Koch submitted a newspaper article reporting the state's financial settlement of the Feinberg lawsuit and Herman's subsequent demotion.

Request 16: (in part) Any documents showing a finding by an Arizona DOC official or a court that a defendant violated the constitutional rights of an ADOC inmate.

Defendant says none of the defendants have felony convictions and notes, rather ambiguously, that "none of the contacted have been found to have violated the civil rights of an inmate."¹

We conclude that it is now up to defendants to ensure that they have *fully* complied with these discovery orders, with the exception of requests (3) and (5). Specifically, defendants are ordered to immediately produce (i) any records regarding the transfer on February 2, 1995, and the approved but unfulfilled East Unit transfers in May and September of 1995; (ii) any records of plaintiff's access to the law library, including sign-in logs; and (iii) any of defendant Herman's personnel records concerning allegations that he obstructed inmates' access to the courts. As to the validation records, it is possible that we may need to revisit the issue in an upcoming status conference. With the passage of time this information is now rather dated and therefore less sensitive.

B. Motion for a protective order

Koch filed a motion [doc#162] on May 11, 1999, seeking a protective order to prevent his transfer out of the state of Arizona during the pendency of the action, arguing that he requires access to witnesses residing in Arizona to prepare for trial, and requesting an expedited ruling. Defendants' response does not contest Koch's position with respect to trial preparation, it merely notes that no such transfer proceedings have been initiated. Because

¹ An update submitted to the court (#130) indicates that defendant Goldsmith was also a defendant in Does v. Stewart, in which the court found ADOC to be deliberately indifferent to the rights of inmates in protective segregation.

we are in Chicago and communication regarding this case has met with a variety of obstacles, we are not convinced that we could timely respond to an emergency request to block plaintiff's transfer. We, therefore, grant Koch's motion for a protective order and enjoin ADOC from transferring Koch to any facility outside Arizona during the pendency of this litigation.

C. Motion to File Materials Under Seal

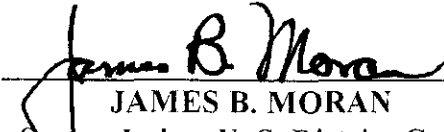
We note that the official docket indicates that doc#154, defendants' motion to file affidavits under seal, remains open. However, that motion was resolved by our order on April 8, 1999, granting defendants' motion to file under seal and denying plaintiff's motion to strike.

D. Motion to stay deadlines

In a telephonic status conference on January 27, 1999 (which incidentally does not appear on the docket and should be so entered), we ordered defendants' dispositive motion on the disciplinary segregation issues to be filed by March 5, 1999; the response was due by April 2, 1999, and the reply by April 16, 1999. All other dispositive motions by defendants were to be filed by June 18, 1999. On May 12, 1999, the state requested [doc#163] that the deadline for further dispositive motion(s) be indefinitely stayed until after we ruled on the cross motions for summary judgment. Koch opposed the motion on the grounds that the state chose to include all of the issues raised by the supplemental complaint in its motion for summary judgment. It is his view that resolution of the pending motions will leave only the issues remanded by the Ninth Circuit, *see below*, with the exception of the notice issue that was dismissed by Judge Silver on August 5, 1996. All of the challenged deadlines have since passed and we will soon resolve the motions for summary judgment. Defendants' motion is denied as moot, and we will address the plaintiff's arguments at our next status conference.

CONCLUSION

For now, we deny Koch's motion for an order to show cause. [doc #146]. Koch's motion for a protective order is granted. [doc#162]. Defendants motion to stay the deadlines for further dispositive motions is denied as moot. [doc#163]. Finally, the docket should be corrected to reflect the resolution of doc#154 by our order dated April 8, 1999.


JAMES B. MORAN
Senior Judge, U. S. District Court

March 27, 2000.

Copies to all parties of record.